Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

CRAWFORD & COMPANY, a Corporation,
Petitioner,

vs.

KERMITH SONNIER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Third Circuit in error in holding that the failure of the defendant to post the Federal Minimum Wage Notice required by the Fair Labor Standards Act regulations in the locations where plaintiff worked was sufficient to toll the statute of limitations for bringing a civil action under the Fair Labor Standards Act until plaintiff actually saw the notice posted in defendant's office?

2. Is the statute of limitations for bringing a civil action for the failure to pay overtime wages under the Fair Labor Standards Act tolled by a failure to post the Federal Minimum Wage Notice in the location where plaintiff worked, even if the notice was posted and he had the opportunity to view it in other facilities of the defendant prior to his work in the locations where the notice was not posted?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, the following is a list of affiliated corporate entities of the Petitioner:

Crawford-THG, Limited

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PETITION FOR A WRIT OF CERTIORARI

Crawford & Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The memorandum opinion of the Third Circuit in *Sonnier v. Crawford & Company,* Case No. 97-3096, is included in Appendix B, A3. The Third Circuit's denial of Crawford's petition for rehearing is included in Appendix E, A20. The District Court's memorandum opinion in *Kermith Sonnier v. Crawford & Company*, United States District Court for the Western District of Pennsylvania Civil Action No. 94-1755, is included in Appendix C, A6. The District Court's order in *Kermith Sonnier v. Crawford & Company*, United States District Court for the Western District of Pennsylvania, Civil Action No. 94-1755 is included in Appendix D, A18.

JURISDICTION

The Third Circuit entered its judgment on October 29, 1997, (App. A1) and denied Crawford's timely petition for rehearing on December 3, 1997. (App. A20). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §255 provides in relevant part as follows:

"Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for . . . unpaid overtime compensation or liquidated damages, under the Fair Labor Standards Act of 1938 . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . . ."

STATEMENT OF THE CASE

Crawford is a worldwide loss adjusting and risk management service organization which provides loss adjusting and related services to insurance companies and self-insured entities. Crawford employs approximately 5,000 full time loss adjusters and up to approximately 600 part time catastrophe adjusters used to augment the company's regular workforce for man-made and natural disasters.

From 1983 until October 1993, Sonnier worked on a part time basis for Crawford as a catastrophe adjuster. Sonnier started to work for Crawford on the Ashland oil spill, in Pittsburgh in January of 1988. From March of 1989 to October of 1989 he worked in Alaska on the Exxon oil spill and then returned to Pittsburgh where he worked on the Ashland oil spill through June of 1991.

Sonnier filed his action in the U.S. District Court for the Western District of Pennsylvania on October 18, 1994 against his former employer, Crawford, for (i) vacation pay for the period from 1984 to Sonnier's termination of employment with Crawford in September, 1993, and (ii) overtime pay under the Fair Labor Standards Act for work performed from 1988 through June of 1991. On September 23 and 24, 1996, the District Court (Hon. Donald J. Lee) conducted a non-jury trial on Sonnier's claims. The District Court ruled in favor of Crawford and against Sonnier with respect to his vacation pay claim under Count I of his Complaint. However, it ruled in favor of Sonnier and against Crawford on Sonnier's claim for overtime pay under the F.L.S.A. for work in excess of 40 hours per week performed in the periods from 1988 through June of

1991. In its Memorandum Opinion, the District Court found that by virtue of Crawford's failure to properly display the Federal Minimum Wage Notice required by 29 C.F.R. §516.4 the two year statute of limitations under 29 U.S.C. §255(a) was tolled. App. A7.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUITS REGARDING THE TOLLING OF THE STATUTES OF LIMITATIONS FOR BRINGING CIVIL ACTIONS UNDER 29 U.S.C. §255(A).

The District Court's tolling of the two year statute of limitations under 29 U.S.C. §255(a) was based solely on the claims of Sonnier that the minimum wage notices were not posted or he did not see them. There was no other claimed basis for equitable tolling. The District Court cited as authority for the equitable tolling *Bonham v. Dresser Industries, Inc.*, 569 F. 2d 187, (3d Cir. 1978), as well as *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324 (E.D. Pa. 1984). App. A13.

Bonham v. Dresser Industries, Inc., supra, is the principal tolling case in the Third Circuit with respect to Federal employee notice postings. However, the issue in *Bonham* was not the tolling of the two year statute of limitations for civil action under 29 U.S.C. §255(a), but rather the tolling of the 180-day requirement for the commencement of administrative proceedings under the ADEA (29 U.S.C. §626). Thus, *Bonham* is not controlling authority for the position that the failure to post a Department of Labor minimum wage notice is sufficient to toll the two year statute of limitations under 29 U.S.C. §255(a).

The difference in an alleged failure to post the required notice on the applicability of the equitable tolling doctrine as applied to (i) the 180-day administrative requirement under 29 U.S.C. §626, as addressed in *Bonham*, and (ii)

the two-year statute of limitation in 29 U.S.C. §255(a), as at issue in this case, is critical. Generally, the liberality of the application of equitable tolling is inversely related to the length of the limitations period. See *Johnson v. Railroad Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975).

The Eleventh Circuit recognized this difference in *Kazanzas v. Walt Disney World Company*, 704 F. 2d 1527 (11th Cir. 1983), cert. denied, 464 U.S. 982 (1983), cited with approval by the Eighth Circuit in *DeBrunner v. Midway Equipment Company*, 803 F. 2d 950, 952 (8th Cir. 1986). In *Kazanzas*, a terminated employee filed suit against his former employer claiming he had been discharged in violation of the Age Discrimination in Employment Act. The former employee had both failed to file a charge alleging discrimination within 180-days of the alleged unlawful practice and had failed to commence a civil action within the two-year statute of limitations under 29 U.S.C. §255(a). In reversing the judgment of the district court in favor of Kazanzas, the Eleventh Circuit Court of Appeals states:

> "We conclude that the facts which led the District Court to equitably modify the 180-day provision do not mandate the tolling of the statute of limitations [29 U.S.C. §255]." 704 F. 2d at 1530.

While recognizing and indeed approving the rationale of the cases (including *Bonham v. Dresser, supra*) which had equitably tolled the shorter statutory periods for bringing administrative actions on the basis of the failure to post the statutorily required notice, the Eleventh Circuit went on to state:

"that rationale has little force for the two-year period when the approved notice does not even mention the two-year statute of limitations." (emphasis added) 704 F. 2d at 1530.

Like the required ADEA notice in *Kazanzas*, the Minimum Wage and Hour Notice required under the Department of Labor regulations (29 C.F.R. §516.4) makes no mention of the two-year statute of limitations provided by 29 U.S.C. §255(a).

The District Court's opinion also cites *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324 (E.D. Pa. 1984) (App. A13.) which, without analysis or discussion, relied on *Bonham* to deny a motion for dismissal of an F.L.S.A. claim on the basis that there was an issue of equitable tolling of the two-year statute of limitations under 29 U.S.C. §255(a). Crawford contends that *Kamens* is (i) distinguishable as it involved additional allegations of misrepresentation, (ii) wrongly decided, to the extent that it relies solely on *Bonham*, and (iii) is not binding on this Court.

II. FAILURE TO POST THE MINIMUM WAGE AND HOUR NOTICE SHOULD NOT EQUITABLE TOLL THE STATUTE OF LIMITATIONS FOR BRINGING A CIVIL ACTION UNDER THE F.L.S.A.

In an action by any employee against his employer to enforce the employee's rights under Federal law, the statute of limitations will not be tolled on the basis of equitable estoppel

> "unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should have unmistakenly understood would cause the employee to delay filing his charge." *Felty v. Graves-Humpreys Co.*, 818 F 2d 1126 (4th Cir. 1987).

This Court has recognized that "(f)ederal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during a statutory period, or where the claimant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.[citations omitted]" *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 96 (1990). In *Irwin*, this Court went on to state that "the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect." *Id* at 96. It has always been an element of estoppel that the plaintiff actually and reasonably rely on the alleged misconduct in foregoing an assertion of his rights. "One who fails to act diligently can not invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984).

Sonnier did nothing to pursue his judicial remedies for the failure of Crawford to pay him overtime until over six years had passed with respect to the first failure and over three years had passed with respect to the last failure. Nor was there any showing that the failure of Crawford to post the Federal Minimum Wage and Hour Notice induced or tricked him into delaying the filing. Indeed, the length of the limitation period (two years) and the fact that the notice

does not even mention the statute of limitations for bringing a civil action means that the rational underlying the application of the equitable tolling document with respect to the 180 day provisions for administrative action simply does not apply. *Kazanzas v. Walt Disney World Company*, 704 F. 2d at 1530.

Finally, the establishment of the statute of limitations is intended to protect both the courts and defendants from the expense and errors of adjudicating stale claims. *Doe v. Blue Cross*, 112 F. 3d 869, 876 (1997). The Third Circuit's opinion in this case highlights the need for the application of the statute of limitations under 29 U.S.C. §255 for the bringing of overtime claims under the F.L.S.A. The court notes that the failure of Sonnier or his witness to be able to testify that the notices were not posted was understandable in that such posting was "relatively minor event". (App. A4). But, the court fails to note that Crawford's witnesses testified that there were notices posted in Crawford's Ashland oil spill office. However, they could not recall which notices were posted and, accordingly, could not testify from personal knowledge that the Federal Minimum Wage Notice was among the notices which were posted, a result that is not surprising in view of the eight years between the posting of the notices in 1988 and the trial of this matter in 1996. Crawford submits that this is the very type of prejudice intended to be avoided by the clearly articulated period of limitations for bringing civil actions in 29 U.S.C. §255(a).

III. IF THE STATUTE OF LIMITATIONS FOR BRINGING CIVIL ACTIONS UNDER 29 U.S.C. §255(A) CAN BE TOLLED BY THE FAILURE OF THE EMPLOYER TO POST THE FEDERAL MINIMUM WAGE AND HOUR NOTICE, IT WAS AN ABUSE OF DISCRETION OF THE TRIAL COURT TO DO SO IN THIS CASE WHERE SONNIER HAD PREVIOUSLY SEEN OR HAD REASON TO SEE THE NOTICE POSTED.

Even where equitable tolling is appropriate, it will not be applied where employees are aware of the underlying facts, but are ignorant of their specific legal rights or fail to seek legal advise. *McClinton v. Alabama By-Products Corp.*, 743 F. 2d 1483, 1485-86 (11th Cir. 1984). The statute of limitations will not be equitable tolled where the notice has been posted in a conspicuous place where the employee could have seen it. *McBrayer v. City of Marietta*, 967 F. 2d 546, 548 (11th Cir. 1992).

It was undisputed in the trial court that the Federal Minimum Wage and Hour Notice had been posted in Crawford's home office cafeteria since at least 1980 behind a glass case where it could not be removed. Sonnier attended training classes in Crawford's office and admitted on cross-examination that he used the cafeteria and even remembered the glass enclosed bulletin board, but could not recall which notices were posted. The failure to see a posted notice will not be sufficient to invoke the equitable tolling doctrine, even in the Third Circuit. *Bonham v. Dresser Industries, Inc. supra* at 193 n.7.

CONCLUSION

For the reasons stated above, Crawford & Company respectfully requests this Court issue a Writ of Certiorari to the Third Circuit.

Respectfully Submitted,

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February 27, 1998

APPENDIX A

Judgment of the United States Court of Appeals for the Third Circuit, Dated October 29, 1997.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3096

KERMITH SONNIER,

v.

CRAWFORD & COMPANY, a Corporation,
Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 94-01755)

BEFORE: MANSMANN, GREENBERG, and ALARCON*,
Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on October 24, 1997.

* Honorable Arthur L. Alarcon, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

On consideration whereof, it is now here ADJUDGED and ORDERED by this court that the order of the District Court entered January 28, 1997, be and is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s P. Douglas Sisk
Clerk

DATED: OCT 29 1997

APPENDIX B

Memorandum Opinion of the United States Court of Appeals for the Third Circuit, Filed October 29, 1997.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3096

KERMITH SONNIER,

v.

CRAWFORD & COMPANY, a Corporation,
Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 94-01755)
District Judge: Honorable William E. Weber

Submitted under Third Circuit LAR 34.1(a)
October 24, 1997

BEFORE: MANSMANN, GREENBERG, and ALARCON*,
Circuit Judges

(Filed: OCT 29 1997

MEMORANDUM OPINION OF THE COURT

---

* Honorable Arthur L. Alarcon, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

GREENBERG, *Circuit Judge*.

Crawford & Company appeals from the judgment entered in this matter on January 28, 1997. In this action appellee Kermith Sonnier obtained a judgment against Crawford, his former employer, for overtime pay under the Fair Labor Standards Act, 29 U.S.C. §201 *et seq*. In addition, Sonnier unsuccessfully sought a judgment for vacation pay but as he does not cross-appeal this issue we are not concerned with it. Judge Lee entered the judgment in accordance with his Memorandum Opinion following a bench trial. Inasmuch as we find no errors of law in his opinion and his findings of fact are not clearly erroneous we will affirm.

We do comment, however, on one point. In its brief Crawford observes that, "[n]either Sonnier nor his two witnesses testified that the minimum wage notice was not *posted*. Rather, they testified that they did not *see* the notices." Br. at 16. In this regard we point out that Sonnier was proving a negative. In the nature of things, a witness often could not testify that something did not happen. At most the witness could say that he or she did not see it happen. That would be particularly true as to relatively minor events such as posting of notices. On the other hand, a witness might be able to testify more positively that a major event simply did not happen. For example, a witness could testify that a building in which he was employed did not burn down.

We recognize that an employer may be in a difficult position with respect to establishing that it posted a notice. After all, unobservant employees with no particular reason to ascertain whether a notice is posted might not see a notice that is there. Yet an employer by an exacting audit process in which precise records set forth that a notice is posted should be able to establish

so conclusively that a notice has been posted that evidence of employees that they did not see the notice would not be sufficient to establish that it was not there. In this case Crawford did not produce such definitive evidence.

In view of the aforesaid, we will affirm the order of January 28, 1997.

TO THE CLERK:

Please file the foregoing memorandum opinion.

/s MORTON I. GREENBERG
Circuit Judge

DATED:

APPENDIX C

Memorandum Opinion of the United States District Court for the Western District of Pennsylvania, Dated January 28, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 94-1755

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KERMITH SONNIER,

Plaintiff,

vs.

CRAWFORD & COMPANY, a corporation,

Defendant.

MEMORANDUM OPINION

January 28, 1997

The plaintiff, Kermith Sonnier ("Sonnier"), brought this action against his former employer, Crawford & Company, a corporation ("Crawford"), to recover (i) vacation pay for the period from 1984 to September 1993 when Sonnier's employment terminated, and (ii) overtime pay pursuant to the Fair Labor Standards Act (29 U.S.C. §216(b)) ("FLSA") for work in excess of 40 hours per week performed for the period from 1988 through June 1991.

While admitting that it did not make vacation payments to Sonnier and did not pay him any premium for hours in excess of 40 hours a week, Crawford claims that Sonnier was a CAT Core adjustor for the period from June 1983 until September 21, 1993, and that under its written policy and practice, CAT Core adjustors were not paid vacation time. Moreover, Crawford claims, in that capacity Sonnier's work was exempt from the overtime provisions of the FLSA in that Sonnier's work was subject to either the "executive" and/or the "administrative" exemptions.

Crawford claims, in any event, that Sonnier's claim for overtime pay under the FLSA is barred by 29 U.S.C. §255 because it was not commenced within two years after the cause of action accrued. Sonnier responds that the "Notice to Employers—Federal Minimum Wage Poster[s]" required by FLSA regulations was not properly posted and therefore, the two-year statute of limitations is tolled.

The Court held a bench trial on September 23 and 24, 1996, and makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Sonnier was hired by Crawford in September of 1979 pursuant to an oral contract of employment.

2. Sonnier was employed from September 1979 through June 1983 as an independent adjustor.

3. Sonnier was employed from June 1983 until September 21, 1993, as a CAT Core adjustor.

4. Sonnier received an annual statement from Crawford (Exhibit 3) which described him as "new hire—full time" as of June 15, 1983.

5. As a CAT Core adjustor, in addition to commissions received while working on assignments, Sonnier received a $200-per-month payment between his assignments, which Crawford characterizes as an advance against future commissions. In addition, Sonnier was entitled to retirement benefits, health insurance benefits and entitled to participate in Crawford's employment stock purchase plan.

6. Sonnier's $200-per-month payment, between assignments, was subject to withholding and he received a W-2 form from Crawford including the amount of those payments.

7. Sonnier was hired by Crawford as an independent property adjustor even though he had no formal training. However, he had prior experience in the construction field.

8. During both the Ashland Oil spill and the Exxon oil spill projects to which he was assigned, Sonnier was paid on a commission basis equal to 50% of Crawford's billings to its clients for the work performed by him.

9. From January 10, 1988, through March 1989 and October 1989 through 1991, Sonnier was assigned to the Ashland Oil spill and was required to submit reports to his superiors concerning his observations of the equipment and employees used by contractors as the worksite.

10. From March 1989 through October 1989, Sonnier was assigned to the Exxon-Valdez oil spill and was required to submit reports to his superior concerning the work of other monitors. While Crawford considered him as the clean-up monitoring department of Crawford in Alaska, Sonnier only had the job title of "monitor" and had no right to hire, fire or discipline any employee on either of the projects and never had any settlement authority.

11. All adjustors, including CAT Core adjustors, are required to have a state adjusting license, and Sonnier had a license only for the state of Texas.

12. John Knight, III, an employee of Crawford since 1976, was the assistant manager of the Ashland Oil spill project of Crawford, and Sonnier worked as a monitor under him.

13. Sonnier never saw a notice at any office of Crawford informing him of his right to overtime pay under the Fair Labor Standards Act.

14. During his prior work experiences before his employment with Crawford, Sonnier frequently worked for amounts which appear to be less than the minimum wage beginning with his first employment when his father paid him $25 per week, and then later $1.10 per hour with no time and one-half for overtime.

15. When he was operating as a subcontractor, Sonnier did not pay his employees overtime, but told them they would receive wages for the time allotted to complete a job even though it took less days.

16. Later when he was employed on the Housing and Urban Development position as a subcontractor, he was paid by the foot, and during his entire career was only paid time and one-half for overtime on one job.

17. Lloyd Hebert has been employed by Crawford as an independent adjustor and worked with Sonnier on the Exxon-Valdez spill project and did not see any FLSA notices posted in any of the offices where he worked.

18. Dale Mills, presently employed as a Core adjustor with Sonnier, worked with Sonnier on the Ashland Oil spill project and did not recall seeing any

FLSA notices posted at the Crawford/Ashland Oil spill project office in the Jacobs Building, Borough of Green Tree, Allegheny County, Pennsylvania.

19. Dale Mills personally set up the disaster office for Crawford in Steubenville, Ohio, for the Ashland Oil spill project and did not place the required FLSA notice in that office.

20. Dale Mills never saw any FLSA notice in the central office location of Crawford in Atlanta, Georgia, or in its cafeteria.

21. John Knight established the Ashland Oil spill project office for Crawford in the Jacobs Building and "copied all of the official posters from the branch office and posted them in the disaster office," but does not recall whether an FLSA notice was included.

22. Although Knight worked on the Exxon-Valdex project, he did not testify about any notice being posted in any of the Alaska offices.

23. Gerald M. Cox, Senior Vice President of Human Resources for Crawford and stationed in Atlanta, Georgia, personally saw an FLSA notice in the home office.

24. During the relevant time period, Crawford had a company policy that the FLSA notice must appear on all bulletin boards and a periodic permanent branch audit to verify compliance with state and federal posting requirements is conducted on an average of every four to five years by Crawford. Cox had no knowledge if either Knight or Mills were aware of the policy.

25. Crawford did not produce any reports prepared in connection with the FLSA compliance audits.

26. The FLSA minimum wage notice was not posted in Crawford's branch offices where Sonnier worked as a CAT Core adjustor during the period from 1980 to September 1993.

27. Sonnier became aware of his right to overtime pay during Hurricane Andrew at the end of 1992 when a fellow employee discussed his having gone to the "Labor Board," who said that Core adjustors were entitled to overtime pay.

28. CAT Core adjustors, including Sonnier, were generally aware that it was Crawford's policy not to give them paid vacation or additional pay in lieu of vacation in excess of the monthly draw of $200.

29. As a CAT Core adjustor, Sonnier always had at least three weeks per year when he did not work and during which he received a payment of $200 a month.

30. Sonnier claimed and received unemployment benefits on at least four occasions between assignments while a CAT Core adjustor.

31. Sonnier was not paid his commissions on Crawford's regular payroll.

32. In 1988 Crawford paid Sonnier a total of $71,307.98.

33. In 1989 Crawford paid Sonnier a total of $130,222.00.

34. In 1990 Crawford paid Sonnier a total of $87,882.53.

35. From January 1, 1991, to June 29, 1991, Crawford paid Sonnier $87,726.03.

36. In addition to not receiving vacation benefits, CAT Core adjustors did not receive sick leave benefits afforded Crawford's regular full-time employees.

37. Sonnier never requested paid vacation, payment in lieu of time off, carryover of unused vacation time, or interpretation of Crawford's vacation policy during his employment with Crawford.

38. Crawford did not have, and Sonnier was not issued, an employee handbook during his employment with Crawford, which handbook set forth vacation benefits to which he was entitled.

39. Crawford did not offer paid vacation or additional compensation in lieu of vacation to any CAT Core adjuster, including Sonnier.

40. The last day of overtime claimed by Sonnier is June 29, 1991.

41. By a preponderance of the evidence, and based upon a detailed accounting submitted by Sonnier, he was underpaid the following amounts for the following years as a result of Crawford's failure to pay time and one-half for overtime:

1988	$12,435.66
1989	21,842.55
1990	10,511.01
1991	4,851.31
TOTAL:	$49,640.53

Conclusions of Law

1. Sonnier's overtime pay pursuant to the FLSA is not barred by the applicable statute of limitations because it was tolled due to the failure of Crawford to properly display the notices advising employees, including Sonnier, of their minimum wage and overtime pay rights pursuant to 29 C.F.R. §516.4.

2. Crawford's failure to post the required notices tolled the running of any period of limitations. *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324 (E.D. Pa. 1984).

3. The DOL interpretative regulations constitute a body of experience and informed judgment as to which courts may properly resort for guidance.

4. Congress has explicitly granted the Secretary of Labor the duty to administer the act. "The power of an administrative agency to administer a congressionally created . . . program necessarily required the formulation of policy and the making of rules that fill any gap left, implicitly or explicitly, by Congress." *Condo v. Sysco Corp.*, 1 F.3d 599 at 604, 605 (7th Cir. 1993).

5. 29 C.F.R. §516.4 required every employer which has employees subject to FLSA's minimum wage provisions to post and keep posted notices explaining the act and to have the notice posted in a conspicuous place in every establishment with such employees are employed so as to permit them to observe and copy it. The precise language of the regulation is as follows:

> §516.4, Posting of Notices, provides every employer employing any employee subject to the Act's minimum wage provisions *shall* post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. Any employer of employees to whom §7 of the Act does not apply because of an exemption of broad application to establishment may alter or modify the poster with a legible notation to show that the overtime provisions do not apply. For example: Overtime provisions not applicable to taxicab drivers. (§13(b) and (17)).

6. Crawford did not produce any written records of the audits required to monitor the posting of FLSA notices in its various offices.

7. Crawford failed to meet its burden to establish that Sonnier meets all the applicable tests for an exempt employee. *Sutton v. Engineered Systems, Inc.*, 598 F.2d 1134 (8th Cir. 1979).

8. Fair Labor Standards Act exemptions "are to be narrowly construed . . . and their applications limited to those establishments plainly and unmistakenly within their terms and spirits." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S. Ct. 453 (1960). An employer has the burden of proving an exemption under the FLSA. *Sutton v. Engineered Systems, Inc.*, 598 F.2d 1134 (8th Cir. 1979).

9. The exemption from Fair Labor Standards Act minimum wage and overtime compensation applies to those employed "in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1).

10. Exemptions from FLSA overtime pay requirements are to be narrowly construed against employer seeking to assert them and their application limited to those establishments plainly and unmistakenly within their terms and spirit. *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896 (3d Cir. 1991).

11. Burden of proving application of administrative employee exemption from Fair Labor Standards Act's overtime pay requirements is upon employer, and if record is unclear as to some exemption requirement, employer will be held not to have satisfied its burden. Fair Labor Standards Act of 1938, §13(a)(1), 29 U.S.C. §213(a)(1). *Id.*

12. Crawford did not meet its burden to the "short" test for "executive" and administrative exemptions pursuant to the Fair Labor Standards Act. The short test applied to employees compensated at a rate of not less than $250.00 per week. Sonnier was compensated at a rate in excess of $250.00 per week.

13. Sonnier did not have authority to hire or fire other employees and did not perform work requiring special training. Moreover, Sonnier's job responsibilities did not require him to exercise discretion and independent judgment.

14. In classifying plaintiff Sonnier as exempt under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §207, Crawford did not act in good faith and had no reasonable grounds for believing that in doing so it was not in violation of the act by virtue of the exemption provided by 29 U.S.C. §213(a)(1).

15. The FLSA defines the regular rate of pay as "all remuneration from employment paid to or on behalf of the employee." 29 U.S.C. §207(e).

16. The regular rate is the hourly rate actually paid to the employee for the normal non-overtime work week for which the employee is employed. *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 65 S. Ct. 1242 (1945).

17. Generally the hourly rate of pay is determined by dividing the employee's total work week remuneration by the number of hours worked during that work week. 29 C.F.R. §778.202.

18. The Fair Labor Standards Act requires overtime compensation at the rate of one and one-half times the "regular rate" for hours worked in excess of 40 hours during the work week. 29 U.S.C. §207(a)(1).

19. The district court may impose liquidated damages to compensate an employee for delay in receiving wages that were improperly denied because of a violation of FLSA. *Reich v. Chez Robert, Inc.*, 821 F. Supp. 967 (D.N.J. 1993), *vacated*, 28 F.3d 401 (ed Cir. 1994) because the court improperly reduced compensatory damages.

20. The imposition of liquidated damages is not punitive. *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982).

21. Employers must show good faith and reasonable grounds before court may exercise discretion to deny or limit liquidated damages for violation of Fair Labor Standards Act's overtime wage provisions. *Id.*

22. There is no evidence in the record that Crawford acted in good faith and with reasonable grounds.

23. Sonnier failed to establish any basis for his recovery of vacation pay.

24. Crawford has no handbook and none was issued to Sonnier that constituted a contract of employment.

25. There was no contract between Sonnier and Crawford entitling plaintiff to receive any paid vacation or payment in lieu of vacation applicable during the period Sonnier was employed by Crawford.

26. Sonnier is entitled to overtime payment in the amount of $49,640.63 together with liquidated damages.

27. Sonnier is entitled to liquidated damages in an amount equivalent to all back overtime wages. 29 U.S.C. §216(b).

28. Sonnier is entitled to reasonable attorneys' fees and costs of the action.

29. Sonnier is not entitled to vacation pay pursuant to his oral employment contract with Crawford.

An appropriate order will be entered in favor of Sonnier and against Crawford for overtime compensation in the amount of $49,640.53, liquidated damages in the same amount, and an award for reasonable attorneys' fees and costs of the action, which fees and costs shall be identified in a motion to be filed by Sonnier to which Crawford may respond.

s/ LEE, J.

APPENDIX D

Order of the United States District Court for the Western District of Pennsylvania, Dated January 28, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 94-1755

KERMITH SONNIER,

Plaintiff,

vs.

CRAWFORD & COMPANY, a corporation,

Defendant.

ORDER OF COURT

AND NOW, this 28th day of January, 1997, it is hereby

ORDERED that judgment is entered in favor of defendant, Crawford & Company, a corporation, and against plaintiff, Kermith Sonnier, on Count I for vacation pay;

IT IS FURTHER ORDERED that judgment is entered in favor of Kermith Sonnier, plaintiff, and against Crawford & Company, a corporation, defendant, on Count II for overtime compensation in the amount of $99,281.06 as follows:

Overtime pay	...	$49,640.53
Liquidated Damages	...	49,640.53
TOTAL:	...	$99,281.06

IT IS FURTHER ORDERED that the plaintiff, Kermith Sonnier, on or before February 11, 1997, may submit a motion for counsel fees and costs which are hereby allowed in his favor; on or before February 25, 1997, the defendant, Crawford & Company, a corporation, may respond to the motion for counsel fees and costs.

s/ DONALD J. LEE
Donald J. Lee
United States District Judge

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APPENDIX E

Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit, Dated December 3, 1997.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3096

KERMITH SONNIER,

v.

CRAWFORD & COMPANY, a Corporation,
Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 94-01755)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and ALARCON*, *Circuit Judges*

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* Honorable Arthur L. Alarcon, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

The petition for rehearing filed by the appellant, Crawford & Company, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:

/s MORTON I. GREENBERG
Circuit Judge

DATED: DEC 3 - 1997

C.C. | J.O.
R.R.
J.F.

Supreme Court, U.S.
FILED
APR 2 1998
OFFICE OF THE CLERK

(2)

97-1426

IN THE
Supreme Court of the United States
OCTOBER TERM 1997

CRAWFORD & COMPANY, a Corporation,

Petitioner,

v.

KERMITH SONNIER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner (hereinafter referred to as Crawford) is a adjusting and risk management service organization providing loss adjusting and related services to insurance companies and self-insured entities. Respondent (hereinafter referred to as Sonnier) was an employee of Crawford as a catastrophe adjuster from the periods of 1983 through October, 1993. Catastrophe adjusters are used to augment the companies regular work force for man-made and natural disasters.

Sonnier began working for Crawford on the Ashland Oil spill in Pittsburgh in January, 1988. He then worked from March, 1989 through October, 1989 in Alaska on the Exxon Valdez oil spill returning to Pittsburgh to work on the Ashland Oil spill through June, 1991. During that period of time Sonnier never received any overtime wages from Crawford as required under the Fair Labor Standards Act (hereinafter referred to as the F.L.S.A.). Sonnier never had notice of any right to overtime wages as there was no Federal Minimum Wage and Hour Notice (hereinafter referred to as notice or required notice) posted by Crawford in any of its facilities where Sonnier worked or even in any conspicuous place so it could be seen if it hand, in fact, been posted. Crawford provided no evidence to rebut the allegation by Sonnier that it failed to post the required notice. None of Crawford's witnesses substantiated its allegations during the trial in front of the District Court that such notice was posted in any of the work facilities as the Ashland Oil spill or the Exxon Valdez Oil spill or any other work area for that matter.

Sonnier filed this civil action in the U.S. District Court for the Western District of Pennsylvania on October 18, 1994 against Crawford for a claim of unpaid overtime wages due for work he perform for Crawford from 1988 through June 1991, and a count for payment of vacation pay for the period of 1984 through Sonnier's termination of employment with Crawford on September, 1993. A bench trial was held on

September 23 and 24, 1996 before the Honorable District Court Judge Donald J. Lee on the aforementioned claims and ruled in favor of Sonnier with respect to the claim for overtime payment under the F.L.S.A. for work in excess of forty (40) hours per week performed in the periods from 1988 through June, 1991. The Memorandum Opinion by the District Court found that Crawford's failure to properly display the notice required by 29 C.F.R. §516.4 [1] the two year statute of limitations under 29 U.S.C. §255(a) was tolled.

I. THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS REGARDING THE TOLLING OF THE STATUTES OF LIMITATIONS FOR BRINGING CIVIL ACTIONS UNDER 29 U.S.C. §255(a) PURSUANT TO THE F.L.S.A.

Crawford alleges that the District Court's decision to toll the two (2) year statute of limitations pursuant to 29 U.S.C. §255(a) was based solely on Sonnier's allegations that there was no required notices posted at any of the facilities of Crawford and that Sonnier never saw any such notices at any of these facilities. Defendant fails to mention that it failed to prove through the testimony of its own witnesses or through any substantive evidence that it ever posted such required notices in any of it facilities, buildings or home office. Plaintiff Sonnier did not see such required notices because such notices were never posted as required under the F.L.S.A by Crawford. Defendant opines that *Bonham v. Dresser*

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[1] 29 C.F.R. § 500 et. seq. are the regulations by which the requirements of the Fair Labor Standards Act are implemented. This was an issue raised by Crawford in support of its reason for not posting the required notice pursuant to the F.L.S.A. This was one of the factors which proved Crawford's bad faith in failing to comply with the clear language of the F.L.S.A. and the regulations.

Industries, Inc., 569 F.2d 187 (3d Cir. 1978) and *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324 (E.D. Pa. 1984) are not applicable to the present situation in that *Bonham* refers to the tolling of the statute of limitations in an action under the A.D.E.A. (29 U.S.C. §626) and that *Kamens* should not be followed because it was incorrect in equitably tolling the statute of limitations for an action brought under the F.L.S.A.

Crawford instead relies on *Kazanzas v. Walt Disney World Company*, 704 F.2d 1527 (11 Cir. 1983), cert. denied, 464 U.S. 982 (1983) , for the proposition that in that case a terminated employee who filed a law suit under the A.D.E.A. would not be applicable in a situation under 29 U.S.C. §255(a) of the F.L.S.A. This is dicta in its truest sense. *Kazanzas* is a situation dealing with the A.D.E.A. and the present civil action is for relief pursuant to the F.L.S.A. They are different acts with different purposes and different considerations. *Kazanzas* also states that "equitable tolling is read into every statute of limitations of every federal act" which obviously applies to the F.L.S.A. *Kamens* also refers to the United States Supreme Court case of *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) which permits equitable tolling in all federal regulations.

II. FAILURE TO POST THE MINIMUM WAGE AND HOUR NOTICE EQUITABLY TOLLS THE STATUTE OF LIMITATIONS FOR BRINGING A CIVIL ACTION UNDER THE F.L.S.A.

Crawford relies on *Doe v. Blue Cross*, 112 F. 3d 869, 876 (1997) for the proposition that the two statute of limitations pursuant to 29 U.S.C. §255 (a) is to be applied for the present claim. This fails to answer the issue of equitable tolling which is clearly applicable in all federal statutes. Reliance of *Doe v. Blue Cross* is misplaced. *Doe* involves an

E.R.I.S.A. action not a claim for overtime wages pursuant to the F.L.S.A. Crawford failed to rebut the evidence provided by Sonnier when he showed, through witness testimony at trial, that no required notice was ever posted. Crawford's own witnesses could not even supports its claim that the notices were ever posted at any of its facilities. Crawford's witnesses specifically stated that they did not remember which notices they posted. This is evidence of no required notice being posted. 29 C.F.R. § 516.4 requires that the notice be posted for purposes of the F.L.S.A. as notice of a right to overtime wages for work perform over forty (40) hours per week. Failure to post the required notice under the F.L.S.A. is a definitive reason for the equitable tolling of 29 U.S.C. § 255 (a).

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990) allows federal courts to extend through equitable relief the statute of limitations for an employee's benefits who is pursuing judicial remedies. Sonnier acted diligently in attempting to pursue his claims under the F.L.S.A. He sought such relief once he was cognizant of the right to sue for overtime payment in the F.L.S.A.. Sonnier clearly testified at trial that he did not know through his prior work experience that there was a right to overtime payment in any job he had ever performed. He stated that it was not until a union meeting that he became aware of such a right to overtime wages for work and at that point in time he diligently pursued his claim. Crawford relied on *Johnson v. Railroad Express Agency*, 421 U.S. 454 (1975) which is not a claim involving the payment of overtime wages pursuant to the F.L.S.A., but a claim under the E.E.O.C. Specifically, *Johnson* allowed the tolling of the statute of limitations to be argued in because it is read into every federal statute. *Id* at 462.

III. THERE WAS NO ABUSE OF DISCRETION BY THE DISTRICT COURT IN TOLLING THE STATUTE OF LIMITATIONS SINCE DEFENDANT FAILED TO POST THE FEDERAL MINIMUM WAGE AND HOUR NOTICE AS REQUIRED BY THE F.L.S.A.

Crawford relies on the *McClinton v. Alabama by-Products Corp.*, 743-F.2d 1483, 1485-86 (11th Cir. 1984) and *McBrayer v. City of Marietta*, 967 F.2d 546, 548 (11th Cir. 1992), in stating that equitable tolling is appropriate but not when a party is ignorant of their specific rights or fail to seek legal advice. *McBrayer* and *McClinton* are cases involving an Equal Employment Occupation Commission (hereinafter referred to as the E.E.O.C.) claim and an Age Discrimination in Employment Act (hereinafter referred to as A.D.E.A.) claim, respectively. Neither case is concerned with overtime wages pursuant to the F.L.S.A. Neither case refers to 29 U.S.C. § 255(a) of the F.L.S.A. *McBrayer* and *McClinton* allow the statute of limitation in those claims to be equitably tolled. Sonnier proved the facts necessary to allow the equitable tolling of the statute of limitations.

Crawford's witnesses did not state that they provided the required notice at any of its facilities. Crawford's allegations that its home office cafeteria had the posting behind a glass case where it could not be removed is merely self-serving evidence. There was no evidence provided that this notice was posted during all periods of time when Sonnier was employed by Crawford. Sonnier's failure to see any notices at any facility or in a cafeteria is due to the fact that such notice was never posted.

REASONS FOR DENYING THE WRIT

The petition's fact bound claim that the courts are in conflict and the trial court abused its discretion in opining that Sonnier proved facts necessary to equitably toll the statute of limitation in 29 U.S.C. § 255(a) does not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits exists as to the issue of equitable tolling of the statute of limitations (29 U.S.C. § 255(a)) for claims under the F.L.S.A.

Crawford's allegation of a conflict is due to its misapplication of the law and regulations. Crawford attempted to interchange the A.D.E.A. with the F.L.S.A. which are different acts with different purposes. When considering the clear language and intent and the corresponding case law interpreting the Act, it is clear that the Circuit Courts are in agreement as to application of the equitable tolling doctrine pursuant to 29 U.S.C. § 255(a).

Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) determined that the equitable tolling of the statute of limitations is applicable to all federal statute of limitations. Clearly this applies to the F.L.S.A. and even the A.D.E.A. The cases of *Johnson v. Railroad Express Agency*, 421 U.S. 454 (1975), *Doe v. Blue Cross*, 112 F.3d 869 (1997), *McBrayer v. City of Marietta*, 967 F.2d 546 (11th Cir. 1992) and *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483 (11th Cir. 1984) which Crawford relied upon for its argument that the statute of limitations provided for at 29 U.S.C. § 255(a) for the F.L.S.A., are not applicable.

A clear review of these aforementioned cases cited by Crawford did not involve any of the those claimants bringing a civil action for overtime wages under the F.L.S.A. None

of those aforementioned cases involved the application of 29 U.S.C. § 255(a) of the F.L.S.A. Most importantly, all of the cases allowed for the equitable tolling of the statute of limitations to be argued. Equitable tolling is an issue which looks to the facts of each case and is not to be applied in a boilerplate manner as Crawford suggests. Such fact finding was the duty of the trial court.

CONCLUSION

For the reasons set forth above, Sonnier respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 2, 1998